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YEAH EH FARN

v.

ALLIANCE BANK (M) BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S3-22-123-2002]
19 SEPTEMBER 2013

C ***CIVIL PROCEDURE:*** *Pleadings - Damages - Distinction between general and special damages - Failure to plead special damages in statement of claim - Whether special damages recoverable if expressly allowed in grounds of decision - Whether claim to be taxed*

D ***CIVIL PROCEDURE:*** *Damages - Assessment of damages - Distinction between general and special damages - Failure to plead special damages - Whether claim allowed - Whether claim to be taxed*

DAMAGES: *Quantum of damages - Special damages - Failure to plead special damages - Whether claim allowed - Whether claim to be taxed*

E

The plaintiff's property which was co-owned with his elder brother was charged to the defendant bank as security for a loan facility advanced to his brother. The property was subsequently foreclosed by the defendant when the plaintiff's brother defaulted
F in payments. In 2002, the property was sold by a public auction. The plaintiff, however, commenced an action against the defendant and claimed damages for wrongful sale of the property. The court in its written judgment dated 5 December 2008 ('the written judgment') held that the plaintiff was entitled to other
G special and general damages incurred as a direct consequence to the foreclosure proceedings. The quantum, however, was to be assessed by the Registrar. The plaintiff then claimed for damages amounting to RM241,125.72 which comprised of (i) legal fees pertaining to the foreclosure; (ii) transport expenses; (iii) hotel
H accommodation; (iv) claims for telephone, fax and postages; (v) interpreter's services; (vi) valuation report; (vii) auctioning costs; and (viii) loss of capital appreciation of property. The Registrar was of the view that these were general damages and allowed the sum of RM100,000 for the travelling expenses
I incurred by the plaintiff to defend the foreclosure proceedings. Dissatisfied, the plaintiff and the defendant appealed against the decision of the Registrar. The defendant argued that all the eight

heads of damages claimed by the plaintiff were in the nature of special damages. It was contended that it was a well established principle that special damages must be expressly pleaded to be recoverable, whereas the eight items were not pleaded in the statement of claim. However, the plaintiff took the position that they were recoverable by virtue of the written judgment which allowed the plaintiff to claim special damages incurred as a direct consequence of the foreclosure proceedings. The appeal from the Registrar raised a point which concerned the rights of a plaintiff to recover special damages which was not the subject of an express pleading in the statement of claim or the order of the court but was expressly allowed in the grounds of decision. The issue that arose for consideration was whether the eight heads of special damages claimed by the plaintiff were recoverable.

Held (allowing defendant's appeal, setting aside award of Registrar):

(1) Special damages must be specifically pleaded and proved in order to be recoverable. The rationale for this requirement is to ensure that a defendant is not taken by surprise at the trial. Thus, a plaintiff was disentitled from adducing evidence in support of special damages where the same had not been pleaded. (para 16)

(2) The eight heads of claims made by the plaintiff were items of special damages and not general damages. The said claims, being special damages, needed to be the subject of an express pleading. In the absence of any reference to those eight items in the statement of claim, evidence of the same could not be led and were irrecoverable. The written judgment could not be relied upon by the plaintiff to ground a claim that special damages should be expressly pleaded had been dispensed with by the court. This principle of law was well entrenched to admit such departure. (para 17)

(3) Transport expenses, hotel expenses, telephone, fax, interpreter's services, valuation report and auctioning costs were out of pocket expenses incurred by the plaintiff in prosecution of his claim. These were not damages, *per se*, which arose from the unlawful sale. Therefore, these heads of claims were claimable as out of pocket costs in the taxation of costs. (para 18)

A **(4)** The plaintiff's claim for legal costs was allowed but not in the full sum. This was because costs meant costs on a party and party basis and the full sum could only be claimed if costs was expressly allowed on a full indemnity basis or on a solicitor - client basis. The loss of capital appreciation of RM135,000 B was not a special damage claim but a general damage as the figure was based on the plaintiff's valuer's subjective valuation and did not represent a precise sum that the plaintiff actually suffered. Hence, the plaintiff was at liberty to include the first seven items of claim in the taxation of his costs. (para 18)

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Case(s) referred to:

MGG Pillai v. Vincent Tan Chee Yioun & Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

D

For the plaintiff - Surinder Kaur; M/s Alvin John & Partners
For the defendants - Chin Tzi Song; M/s Ariffin & Partners

Reported by Sandra Gabriel

E

JUDGMENT

SM Komathy Suppiah JC:

F **[1]** This appeal from the Registrar raises a point which concerns the right of a plaintiff to recover special damages which is not the subject of an express pleading in the statement of claim or the order of court but expressly allowed in the grounds of decision.

G

The Facts

[2] The factual matrix relevant to this appeal are as follows. The plaintiff's property, which he co-owned with his elder brother, was charged to the defendant bank as security for a loan facility of RM60,000 advanced to his brother. At the request of the H plaintiff's brother, the defendant increased the facility to RM90,000 and the charge was increased and up-stamped to secure repayment of the revised facility. The plaintiff's brother consented to the up-stamping but the defendant was unable to procure the I plaintiff's consent to the same.

[3] The said property was foreclosed by the defendant when the plaintiff's brother defaulted in the repayment. Pursuant to a court order, the property was sold by public auction in the year 2002, for RM210,000.

[4] The plaintiff then commenced this action against the defendant claiming damages for wrongful sale of the property in breach of the express terms of the charge annexure. His claim was allowed on 5 December 2008 by Hishammudin J after a full trial. The judgment granted by His Lordship in open court was to this effect:

(a) Special damages amounting to RM105,000;

(b) General damages to the plaintiff to be assessed before the Registrar; and

(c) Interest and costs.

[5] However, in his written judgment which followed later, Hishammudin J, stated, *inter alia*:

> Accordingly, the plaintiff, being a co-owner is entitled to be compensated in the sum equivalent to half of the value of the house. By reason of the foreclosure proceeding, which had been unlawfully commenced against him by the defendant, he had been unlawfully deprived of his property. I take the value of the whole house as being RM210,000. I am taking this as the value of the whole house because although the defendant's valuer valued the property at RM205,000 for purpose of the foreclosure proceedings, however, the house was in fact sold at the public sale for RM210,000. To my mind, this later figure (RM210,000) should appropriately be taken as the value of the whole house (in any case the difference between the valuation figure (RM205,000) and the sale price (RM210,000) is only a mere RM5,000 and moreover, the plaintiff's counsel has conceded that the sale price of RM210,000 should be taken as being the appropriate market value for the whole house. This means that the plaintiff is entitled to be compensated in the sum of RM105,000.
>
> *In addition the plaintiff is also entitled to such other special damages and general damages incurred by him, but only if any, as a direct consequence of the foreclosure proceedings. The quantum, however, is to be assessed by the Registrar.*

A I am disallowing the items of damages prayed for in paragraphs 10.4 and 10.5 of the statement of claim (the plaintiff has abandoned his claim for damages under paragraph 10.3). (emphasis added)

B **[6]** Items 10.3, 10.4 and 10.5 mentioned in the above judgment were the only items of special damages that were claimed by the plaintiff in his statement of claim. It is clear that these were disallowed by His Lordship.

[7] Based on the aforesaid judgment, the plaintiff proceeded to C assess damages before the learned Registrar. The plaintiff claimed damages amounting to RM241,125.72 which was tabulated as follows:

(a) Legal fees pertaining to the foreclosure - RM28,181.50;

D (b) Transport expenses incurred (airfare, taxi transfer in KL and Sydney) for the sum of RM52,785.62;

(c) Hotel accommodation for the sum of RM2,400;

E (d) Telephone, fax, postages for the sum of RM1,000;

(e) Interpreter's services for the sum of RM900;

(f) Valuation report for the sum of RM1,000;

F (g) Auctioning costs for the sum of RM19,858.60; and

(h) Loss of capital appreciation of property for the sum of RM135,000.

[8] The defendant disputed these heads of claims and took the G position they were not recoverable.

[9] The learned Registrar took the view that these were general damages and allowed a sum of RM100,000 to the plaintiff. These items were allowed for the travelling expenses incurred by him in H taking flights from Sydney to Kuala Lumpur in defending the foreclosure proceedings. She allowed it on account of the fact that the plaintiff was residing in Sydney at all material times.

[10] The plaintiff and defendant have both appealed against the I decision of the learned Registrar made on 26 June 2013 that the plaintiff recover damages assessed in the sum of RM105,000 together with interest thereon.

Arguments Of Parties

[11] The defendant argued that all the eight heads of damages claimed by the plaintiff in the assessment before the Registrar were in the nature of special damages. It was contended that it was a well established principle that special damages must be expressly pleaded to be recoverable, whereas none of the eight items were pleaded in the present case. In support of this submission, reliance was placed on the often-cited decision of the Federal Court in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324. As parties are bound by their pleadings it was necessary to revert to the pleadings to determine what a successful plaintiff is entitled to claim as special damages.

[12] The plaintiff did not seriously dispute that the eight items of claim were not pleaded in the statement of claim. Neither did the plaintiff dispute that these heads of claim were in the nature of special damages. The plaintiff, however, took the position that they were recoverable by virtue of the written judgment of Hishammudin J allowing the plaintiff to claim special damages incurred as a direct consequence of the foreclosure proceedings.

Issue

[13] The singular issue for consideration is whether the eight heads of special damages claimed by the plaintiff were recoverable?

The Law

[14] The law on the subject of general and special damages is well settled in Malaysia. Two authorities illustrate this point clearly. In *MGG Pillai v. Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912; [1995] 2 MLJ 493 the Court of Appeal observed:

> Counsel for the respondent, in answer to the submission made on behalf of the appellants, relied on the following passage from *Lachman v. Pyarchand* AIR 1959 Raj 169, at p. 175 which, in my view correctly states the law:
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> In the second place, the learned civil judge seems to have thought that the plaintiff had failed to prove the damages claimed by him and therefore he was not entitled to claim any. Now, so far as this aspect of the case goes, I desire to say, first that damages are of two kinds: general and special, and the learned civil judge

A does not appear to have appreciated the distinction between them, and second, that while special damages are required to be specifically pleaded and proved general damages are not.

General damages are damages which the law presumes to flow from, and as if it were the natural and probable consequence of
B the defendants' act. Therefore general damages need not be pleaded specifically nor need any evidence be produced to prove them as such. I have no doubt that having regard to the pleadings of the plaintiff in the present case, what he really claimed for was general and not special damages.

C

[15] In *Ong Ah Long v. Dr S Underwood* (*supra*), the case cited by the defendant, Syed Agil Barakbah FJ in delivering the judgment of the Federal Court summed up the law comprehensively as follows:

D It is a well-established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in the proper measure of damages and are not too remote (see *Halsbury's Laws of England* 4th edition, volume 11 page 218 para
E 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye, F.J. (as he then was) in *Yee Hup Transport & Co and Anor v. Wong Kong* [1967] 2 MLJ 93 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer L.J. in *Ilkiw v. Samuels* [1963] 1 WLR
F 991; [1963] 2 All ER 879 he held that the general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat, F.J. (as he then was) in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216 applied the principle in *Ilkiw v. Samuels* (*supra*) that special damages if pleaded as in that case could be
G recovered. The principle was also adopted by Mohamed Azmi, J. (as he then was) in *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 MLJ 295 in the Federal Court.

The reason that special damages have to be specifically pleaded is
H to comply with its object which is to crystallise the issue and to enable both parties to prepare for trial (per Edmund Davies, LJ in *Domsalla v. Barr* [1969] 1 WLR 630 635). In special damages claims the exact loss must be pleaded where the precise amount of item of damages has become clear before the trial either because it has already occurred and so become crystallised or
I because it can be measured with complete accuracy (*MacGregorn Damages* 14th edition page 1012 para 1498). The purpose is to

put the defendants on their guard and tell them what they have to meet when the case comes on trial (per Cotton, LJ in *Phillips v. Phillips* (1878) 4 QBD 127 139.

And, continued at pp. 306-307 (CLJ); p. 329 (MLJ):

Be that as it may, we prefer the view that in practice special damages have to be specifically pleaded having regard to prevalent authorities. It requires the plaintiff to plead and particularise any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial, and which is capable of substantially the exact calculation. It is commonly referred to as special damages in the sense that fairness to the defendant requires it to be pleaded. (Per Lord Donovan in *Perestrello E. Companhia Limitada v. United Paint Co. Ltd.* (*supra*) and per Lord Goddard in *British Transport Commission v. Gourley* [1967] 2 MLJ 93. The obligation to particularise is stated in *Mayne and MacGregor on Damages* 12th Edition para 970:

> Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.

As stated by Diplock, LJ in *Ilkiw v. Samuels* (*supra*) on p. 1006:

> ... In my view, it is plain law - so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last one hundred years - that you can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000 - at any rate, a very much larger sum than £77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at, at the sum of £77 for special damage. The evidence about the loss of earnings in excess of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be.

[16] The principle that emerges clearly from these authorities is that special damages must be specifically pleaded and proved in order to be recoverable. The rationale for this requirement is to ensure that a defendant is not taken by surprise at the trial and would know what is the case he has to meet at the trial. Thus, a plaintiff is disentitled from adducing evidence in support of special damages where the same has not been pleaded.

Analysis

[17] It is common ground that the eight heads of claims made by the plaintiff were items of special damages and not general damages as concluded by the Registrar. I agree with the defendants that the eight heads of claims made by the plaintiffs, being special damages need to be the subject of an express pleading based on the principles stated in the authorities discussed above. In the absence of any reference to these eight items in the statement of claim, evidence of the same cannot be led and these are irrecoverable. The written judgment of Hishammudin J cannot be relied upon by the plaintiff to ground a claim that the requirement that special damages must be expressly pleaded has been dispensed with by the court. This principle of law is too well entrenched to admit such a departure.

[18] On a closer scrutiny and examination, I find that six out of the eight items claimed by the plaintiff, to wit, transport expenses to and from Sydney to Kuala Lumpur on several occasions to attend the court hearing, hotel expenses in Kuala Lumpur for attending the case, telephone, fax, interpreter services, valuation report and auctioning costs, are in fact out-of-pocket expenses incurred by the plaintiff in prosecution of this claim. These are not damages *per se* arising from the unlawful sale. These heads of claims are therefore claimable by the plaintiff as out of pocket costs in the taxation of costs which the order of court expressly allowed. The plaintiff's claim of legal costs in item (i) is also allowed under cost but not the full sum of RM28,181.50. This is because costs means costs on a party and party basis. The full sum may only be claimed if costs is expressly allowed on a "full indemnity basis" or on a "solicitor-client basis". The last head of claim of RM135,000 as "loss of capital appreciation" is in my view, not a special damages claim but a general damages as the said figure is based on the plaintiff's valuer's subjective valuation and does not

represent a precise sum that the plaintiff actually suffered. However, as this head of claim has been considered by the trial judge who awarded a sum of RM105,000 it would amount to a duplication. Hence, the plaintiff is at liberty to include the first seven items of claim in the taxation of his costs.

Conclusion

[19] For the reasons given, I allowed the defendant's appeal and set aside the award of RM100,000 made by the Registrar as general damages.